

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Orrin G. Hatch
Chairman, Committee on Labor and
Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to submit the views of the Department of Justice regarding S. 1815, the proposed "Polygraph Protection Act of 1985." With the following modifications to Section 8, the Department of Justice would not oppose the enactment of this legislation.

The bill would prohibit the administration of polygraph examinations by private sector employers to employees or prospective employees. Section 8 of the bill exempts individuals employed by federal, state and local governments. In addition, this section permits the Department of Defense to administer polygraph tests, pursuant to the program outlined in the Department of Defense Authorization Act for 1986, to personnel of its contractors who have access to classified information. The Department of Justice shares the Senate's concern regarding the sensitive nature of the activities performed by many Department of Defense contractors and agrees that an exemption for contractor employees engaged in such activities is justified. This type of contracting is not, however, limited to the Department of Defense. Other Executive agencies and departments engage contractors to perform functions that are directly related to intelligence and other national security matters. The justifications for a Department of Defense exemption are equally persuasive when applied to the national security related contracts of these other agencies and departments. The Department of Justice, therefore, recommends a broader exemption that would extend also to employees of contractors for these other agencies and departments, provided that the employee has actually been identified as requiring access to classified information before being subjected to a polygraph examination.

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In lieu of Section 8 of S. 1815, the Department of Justice proposes the following:

Exemptions

Sec. 8:

The provisions of this Act shall not apply with respect to any individual who is employed by the United States Government, a state government, city, or any political subdivision of a state or city, nor shall this act prohibit the administration, in connection with the performance of any function requiring access to classified information, of a polygraph examination to personnel of a contractor to the Central Intelligence Agency, the Department of Defense, the Department of Energy, the Department of State, the Federal Bureau of Investigation, the National Security Agency, the Treasury Department, or other federal agencies or departments whose contractors require access to classified information.

This version of Section 8 would address the concerns of executive agencies engaged in sensitive governmental functions and simultaneously protect the privacy interests of employees by ensuring that access to classified information is the prerequisite to administering a polygraph examination.

In addition to the concern cited above, we note that the language of Sections 3(1) and 3(2) of the bill is extremely broad and extends beyond the stated purposes. In its present form, this legislation would not only prohibit employers from requiring, requesting, or suggesting that employees or prospective employees submit to polygraph examinations in connection with their employment, but would also prohibit the employer from permitting an employee to submit to such tests for any purpose. This language could be construed to place an affirmative duty on an employer to prevent employees, or even prospective employees, from submitting to such examinations by any person for any purpose, lest the employer be subject to the enforcement provisions of Section 7. Because the stated purpose of the bill is "to prevent the denial of employment opportunities based on the use of lie detectors," the Justice Department is concerned that the present language may overstep these objectives. The prospect of being in violation of the bill's provisions simply by not preventing an employee from submitting voluntarily to a polygraph examination, especially if unrelated to the employee's position with an employer and administered by an entity other than the employer, would do little to promote the purposes of the bill.

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Section 3(2), in its current form, would prohibit reference to, or the use of, any polygraph examination results for any purpose, without regard to whether the test was administered by an employer who seeks to rely on the information for employment purposes. As written, the bill could prohibit reliance on results obtained from a polygraph test legally administered by an agency with the authority to do so, such as a local law enforcement organization. As with Section 3(1), it is not clear that the stated purpose of the Act calls for this degree of restriction on the ability of employers to protect their interests.

We believe that Section 8 should be amended as suggested above and that consideration should be given to narrowing the breadth of Section 3. Otherwise, the Department of Justice interposes no objection to enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs